

INCOME TAX (EARNINGS AND PENSIONS) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Omitted material

Schedule 3: Approved Saye Option Schemes

Overview

Part 3: Eligibility of individuals to participate in scheme

Paragraph 9: Requirements relating to the eligibility of individuals: introduction

3270. This paragraph lists the two requirements relating to the eligibility of individuals and partly derives from paragraph 1(1) of Schedule 9 to ICTA.

Paragraph 10: The employment requirement

3271. This paragraph derives from paragraph 26(3) of Schedule 9 to ICTA and provides that the individual must be a director or an employee of the scheme organiser (or a constituent company in a group scheme) at the time of participation in the scheme. The effect of ESC B27, which is now codified in paragraph 46 of this Schedule, is that employment in jointly owned companies as defined there can also qualify.

3272. There are exceptions to this rule. Paragraphs 19 and 21(1)(e) and (f) of Schedule 9 to ICTA are applied so that rights under the scheme may be exercised after changes have occurred which would otherwise mean the requirement was not met. No reference is made in the source legislation to paragraph 18 of Schedule 9 to ICTA. This paragraph which is rewritten as paragraph 32 of this Schedule, allows the option to be exercised up to one year after the option holder dies.

3273. It is the practice to treat schemes as if paragraph 18 of Schedule 9 to ICTA did not infringe the requirement. The scope of the disregard is made clear in *sub-paragraph (2)* by stating that this requirement is not infringed by a provision required or authorised by this Schedule. See *Note 68* in Annex 2.

Paragraph 11: The “no material interest” requirement

3274. This paragraph derives from paragraph 8 of Schedule 9 to ICTA and from section 187(3) of ICTA and there are some drafting changes.

3275. It is the introductory provision which precludes admission into the scheme of an individual with a “material” interest in a close company whose shares are subject to the option or its parent company (or certain members of a consortium).

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3276. The exact length of the preceding 12-month period has been clarified. It is expressed so as to include the “trigger date”, that is the date when the test is made. By so including it explicitly, the period is shorter by one day and so in favour of the taxpayer.
3277. The interests of the option holder are aggregated with those of any associates. “Associate” is defined in paragraphs 14 to 16 of this Schedule.
3278. The definition of close companies is subject to sections 414 and 415 of ICTA and there is now a short explanatory summary of those sections.

Paragraph 12: Meaning of “material interest”

3279. The definition of material interest is imported here from section 187(3) of ICTA. The capped percentage is applied to both the straightforward control through share capital and other more indirect routes. The layout mirrors the similar rules in the new (FA 2000) schemes.
3280. Unlike in the new (FA 2000) schemes this provision applies to close companies only, see paragraph 11(1). Redundant wording in section 187(3) of ICTA has been removed (the reference to “where the company is a close company”).

Paragraph 13: Material Interest: options and interests in SIPs

3281. This paragraph extends the previous paragraph; shares subject to an option are to be counted for the material interest test. This derives from paragraph 38 of Schedule 9 to ICTA. Under *sub-paragraph (3)* if the shares of an option holder which have not yet been issued are taken into account the total share capital is similarly increased.
3282. A disregard has been introduced for the unappropriated shares held by trustees of a SIP trust on the lines of the EMI code and similar to that contained in paragraph 39 of Schedule 9 to ICTA for approved profit sharing (APS) schemes. See *Change 167* in Annex 1.
3283. Paragraph 39 of Schedule 9 to ICTA (the disregard for shares held in APS schemes) has not been reproduced in this Schedule. It is contained in Part 8 of Schedule 7 (Transitionals and savings).

Paragraph 14: Meaning of “associate”

3284. This paragraph also supplements paragraph 12 of this Schedule. It contains the definition of “associate”; and is in its turn supplemented by paragraphs 15 and 16 of this Schedule. The paragraph derives from sections 187(3) and 417(3) and (4) of ICTA (in the first two cases, parts of those subsections), and continues the pattern of bringing into the main text the ancillary explanations needed to understand the expression “material interest”.
3285. The company in *sub-paragraph (1)(c)* is identified as the company mentioned in paragraph 11(2) of this Schedule. This is also copied in later paragraphs to which it is relevant. This makes explicit both interpretation and practice, thereby limiting the scope of the definition of associate in the case of a trust or estate. The term “personal representatives” is defined in section 721(1). See *Change 159* in Annex 1.
3286. In *sub-paragraph (3)*, the definition of “relative” has been slightly amended.

Paragraph 15: Meaning of “associate”: trustees of employee benefit trust

3287. This paragraph supplements paragraph 14 of this Schedule and contains provisions that apply where an individual is interested as a beneficiary of an employment benefit trust. The paragraph derives from paragraph 40 of Schedule 9 to ICTA.
3288. This paragraph has counterparts in Schedules 2, 4 and 5 to this Act. Chapter 11 of Part 7 (Supplementary provisions) defines the expression “employee benefit trust”, and

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deals with further matters arising when payments from employee benefit trusts are made. There are references to provisions in that Chapter in the later provisions of this paragraph.

3289. *Sub-paragraph (3)* is new. It is modelled on EMI and SIP and amplifies the approach in paragraph 40(1) of Schedule 9 to ICTA, now reflected in *sub-paragraph (2)* of this paragraph. This ensures that the test in sub-paragraph (2) works satisfactorily.

Paragraph 16: Meaning of “associate”: trustees of discretionary trust

3290. This derives from paragraph 37 of Schedule 9 to ICTA (and sub-paragraph (3) of section 187(4) of ICTA) and provides a disregard from association where an individual disclaims an interest in a discretionary trust.

3291. Paragraph 37(2) of Schedule 9 to ICTA and the reference to 14 November 1986 in paragraph 37(3) have not been rewritten as these are spent.

3292. The references to disclaimers or releases executed “under seal” (from sub-paragraphs (3) and (5) of the paragraph 37) have been omitted, because section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 abolished the requirement for a seal in the case of deeds executed by an individual.